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I. Introduction

Throughout his long academic and legal career, Rudolf B. Schlesinger, neighbor at nearby Cornell University, mentor in the intricacies of continental civil procedures and friend, was interested in the interrelationship of legal systems.[1] It is the purpose of this brief paper dedicated to his memory to examine a few instances in which there has been some interaction between U.S. and European law, or more precisely, the law of the European Community (Community), in a rather concrete context: the reaction of the Court of Justice of the European Communities (Court of Justice) to a number of cases decided by the U.S. Supreme Court.[2]

The Court of Justice, instituted by articles 164 to 188[3] of the Treaty Establishing the European Community (Treaty) and by the analogous provisions of the Treaties Establishing the European Coal and Steel Community and the European Atomic Energy Community has, as its main function, as article 164 states, to insure that "in the interpretation and application of the Treaty, the law (and not just the

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1. For a late example, see Rudolf B. Schlesinger, *The Past and Future of Comparative Law*, 43 AM. J. COMP. L. 477 (1995).

2. For a much more general discussion of the influence of American law in Europe, see Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991). While a few lower federal court cases are mentioned below, this study has, however, been limited essentially to U.S. Supreme Court cases in order to stress the interaction of courts of comparable stature and significance.

3. These articles will be renumbered if and when the Amsterdam Treaty is ratified to articles 220-245. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUOPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, 1997 O.J. (C 340) 1.

Treaty itself) is observed."[4] The Treaty is not, however, an ordinary international agreement. Early in the history of the Community, the Court of Justice recognized in the famous *Van Gend en Loos* case that the Community "constitutes a new legal order in international law, for whose benefits the States have limited their sovereign rights, albeit within limited fields."[5] Regardless of the exact definition that may be appropriate for the Community,[6] it thus has at least some quasi-federal characteristics. It is, therefore, not surprising that some parallels are drawn between the U.S. Supreme Court and the Court of Justice.[7]

Unfortunately, the actual decisions of the Court of Justice offer no direct clue as to whether they have been influenced by decisions of the U.S. Supreme Court. Until the accession of two common law jurisdictions to the Community in 1973, Ireland and the United Kingdom,[8] the Court of Justice did not cite even its own cases. Thereafter it did so, but its opinions still tend to be somewhat bland and general and to cite, in addition to the Court of Justice's own case law, only Community materials. However, the Court of Justice includes an institution not found in the United States, that of the Advocates General. The currently (until 2000) nine Advocates General rank in salary grade and similar perquisites of office with the fifteen judges of

4. The European Community [hereinafter EC] was originally created as the European Economic Community [hereinafter EEC] by the Treaty of Rome of March 25, 1957 [hereinafter E.C. Treaty or simply Treaty], at which time the European Atomic Energy Community [hereinafter EAEC] was also created. An official English translation was annexed to the Treaty on January 22, 1972 when Denmark, Ireland and the United Kingdom joined the EEC and the EAEC. CONVENTION ON THE ACCESSION OF THE KINGDOM OF DENMARK, IRELAND AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, Jan. 22, 1972, O.J. (L 73) 1 (1972) [hereinafter ACCESSION OF DENMARK, IRELAND AND THE UK]. The European Coal and Steel Community [hereinafter the ECSC] was created earlier, by the Paris Treaty of April 18, 1951. The only official version is in French. The Maastricht Treaty renamed the European Economic Community simply the "European Community," but it did not change the names of the EAEC or the ECSC. TREATY ESTABLISHING THE EUROPEAN UNION, Feb. 7, 1992, O.J. (C 191) art. G(1) (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY].

5. Case 26/62, Van Gend en Loos v. Administratie der Belastingen, 1963 E.C.R. 5. *Cf.* Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585.

6. The literature on the topic is quite large. *See, e.g.*, Konrad Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990).

7. For a recent piece, see J. L. Sauron, *Le traité d'Amsterdam, une Réforme Inachevée? [The Treaty of Amsterdam, an Incomplete Reform?]*, 1998 RECUEIL DALLOZ [CHRONIQUE] 69, 70 (arguing that the similarities will increase after the ratification of the Amsterdam Treaty).

8. *See*, ACCESSION OF DENMARK, IRELAND AND THE UK, *supra* note 3.

the Court of Justice. It is their function, in the words of article 166 of the Treaty to " [act] with complete impartiality and independence, to make in open court reasoned submissions on cases brought before the Court of Justice in order to assist the Court in the performance of the task assigned to it in Article 164." They are not the lawyers for the Community or Community Institutions when the Community is involved in litigation before the Court of Justice. That role is performed by members of the legal services of the respective Institutions or by outside counsel. The Advocates General, on the other hand, constitute a body of official *amici curiae*, who contrary to the usual position of *amici* in American courts, have no axe to grind and are there merely to enlighten the Court of Justice by giving it a view untainted by the necessarily partisan approach of the parties' counsel. Normally, one Advocate General appears in each case; occasionally, two submissions are presented.

The submissions of the Advocates General, sometimes confusingly referred to as "opinions" in the official reports of the Court of Justice, where they are reprinted together with the decisions to which they relate, are much more detailed than the Court's decisions themselves. They analyze all the aspects of a case and provide references to factual sources, scholarly writings and such. The deliberations of the Court of Justice are not public, and dissenting opinions are not published. It is, however, generally assumed that in the frequent instances in which the Court of Justice follows the recommendations in an Advocate General submission, the submission is a fair indication of the Court's thinking. It is therefore significant that, in a number of cases, Advocates General submissions cited decisions of the U.S. Supreme Court (and, occasionally, of lower federal courts) and thus have brought these cases formally to the attention of the Court of Justice. The balance of this paper will, as noted above, be devoted to an examination of some of these instances.

II. Case References

Article 2 of the Treaty[9] provides, as a fundamental task for the Community, the establishment of a "common market," an area in which goods, persons, services and capital move freely. This provision is then put into effect by a variety of others, including in particular article 30 which prohibits quantitative restrictions and other

9. The Amsterdam Treaty would not change that number.

restraints on trade in goods between the Member States. The two provisions together thus have an effect, as to the powers of the Member States, somewhat similar to the effect the commerce clause in article I, section 8 of the U.S. Constitution has on the powers of the states. The latter—and for the present purposes no extensive discussion is needed—when not implemented by federal legislation, may prohibit state action that burdens, unfairly taxes or discriminates against interstate (and foreign) commerce.[10] When it is implemented by federal legislation, the commerce clause may prohibit or preempt contrary or incompatible state action.[11] It thus seemed relevant to inquire whether the long American experience with the question of the lawfulness of state-imposed restraints on commerce is useful to the Community.

In a relatively early case, the Court of Justice ruled that any measure which, directly or indirectly, limited trade between the Member States violated article 30 unless it was strictly necessary for the protection of a recognized exception to that article, such as the protection of public health.[12] The Court of Justice subsequently dealt with numerous instances in which Member States adopted some measure regulating a branch of the economy that did not intend to limit directly the movement of goods into that Member State but which was likely to have some impact on trade between Member States nevertheless. After initially taking a somewhat strict view of such measures, the Court of Justice eventually clarified its position by drawing a distinction between rules that directly concern the nature, packaging, etc. of the goods themselves, which violate article 30 without more, and other regulatory rules that concern the manner of doing business and are normally permissible if they apply equally to local and non-local activities or goods and are thus not discriminatory.[13]

Apparently in order to protect the local and regional press, for

10. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624 (1982); Philadelphia v. New Jersey, 437 U.S. 617 (1978) (prohibition on out-of-state garbage).

11. For a recent example, see *Boggs v. Boggs*, 520 U.S. 833 (1997).

12. Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837; *see also* Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 (the so-called "Cassis de Dijon" case). Article 30 will be article 28 under the Amsterdam Treaty if and when the Amsterdam Treaty is ratified.

13. *See* Joined Cases, C-267 & 268/91, Criminal Proceedings Against Bernard Keck and Daniel Mithouard, 1993 E.C.R. I-6097. Because this case was decided in November 1993 and seemed to modify the Court of Justice's position, it has, with a degree of hyperbole, been referred to as the "November Revolution." Article 30 will be article 28 under the Amsterdam Treaty if and when it is ratified.

which advertising by retail establishments is an important source of revenue, French law prohibits television advertising by retail establishments. An additional aim of the measure may have been the protection of small local retail stores against supermarket-type distribution systems, deemed to be more likely to resort to television advertising. One of the more aggressive French supermarket chains sought to have the prohibition invalidated on the ground that it violated Community law. When the case[14] came before the Court of Justice, the Advocate General assigned to it, Mr. Jacobs, suggested that advertising played a significant role in promoting the free flow of trade and a Member State restriction on advertising might thus be prohibited by article 30.[15] To support his position, he cited a U.S. Supreme Court decision, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[16] in which the Supreme Court stated that commercial speech (in this case drug price advertising) enjoyed protection under the First Amendment. The Advocate General quoted this passage:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[17]

In essence, the Advocate General disagreed with the Court of Justice's distinction between restrictions on trade, which concerned the goods themselves and were generally violative of Community law and rules that concerned methods of doing business, such as advertising, which were not violative. The Advocate General argued that restrictions on advertising could have a significant impact on trade, especially in the case of the introduction of new products or attempts to penetrate a new market. He felt, however, that the French rule in question produced a *de minimis* impact on trade and therefore did not object to its application. The Court of Justice did not accept the Advocate General's reasoning; it referred back to its general case law

14. Case 412/93, Société d'importation Edouard Leclerc-Siplec v. TF1 Publicité SA, 1995 E.C.R. I-179, 3 C.M.L.R. 422 (1995).

15. Article 30 will be article 28 under the Amsterdam Treaty if and when it is ratified.

16. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

17. *Id.*, 425 U.S. at 765.

on the distinction between rules concerning products themselves and rules concerning selling practices. It was under this reasoning that the Court of Justice found the French rule was valid. Thus, the reference to the U.S. Supreme Court's decision in *Virginia State Board of Pharmacy* did not seem to persuade the Court of Justice of the importance of completely free advertising for the untrammeled flow of trade in a common market.[18]

Another instance involving a conflict between a rule of a Member State and Community provisions on the free flow of goods in which American decisions were cited was due to a problem that existed both in Europe and in the United States, namely the long time it takes to obtain approval by the competent authorities for the marketing of prescription drugs. Manufacturers of "generic" drugs in both places tend to acquire patented drugs some time before the expiration date of the patent in order to submit them to the approving authority for permission to sell an identical generic drug.

The ability to file for sales approval in such a rapid fashion by using the patent holder's drug allows the manufacturer of the generic drug to sell it immediately after the patent expires. Dutch courts ruled that a Dutch manufacturer of generic drugs violated Dutch law by doing so. The issue whether prohibiting such a practice on the basis of national patent law was compatible with Treaty rules on the free movement of goods came before the Court of Justice in *Generics BV v. Smith, Kline and French Laboratories, Ltd.*[19] The Advocate General defended the Dutch position and, in support, referred to the initial American rule, which prohibited the practice.[20] He noted that in *Eli Lilly & Co. v. Medtronic, Inc.*,[21] the U.S. Supreme Court approved a similar patent violation only after a change in the patent laws which lengthened patent protection for drugs but permitted the use of patented drugs for certain purposes. The Court of Justice

18. Note that in a more egregious case, the Court of Justice ruled that a ban on advertising by flyers distributed across the Belgian-Luxembourg border violated article 30. In that case there was an obvious, direct impact on trade between Member States. *See* Case C-362/88, GB-INNO-BM v. Confédération du Commerce Luxembourgeois, 1990 E.C.R. I-667, Common Mkt. Rep. (CCH) ¶ 346 (1991).

19. Case C-316/95, Generics BV v. Smith, Kline & French Laboratories Ltd., 1997 E.C.R. I-3429, Common Mkt. Rep. (CCH) ¶ 1,029 (1997).

20. The Advocate General mentioned *Roche Products, Inc. v. Bolar Pharmaceutical Co.*, 733 F.2d 858 (Fed. Cir. 1984).

21. Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661 (1990). Another issue in the case was whether the principle also applied to certain non-drug items requiring the Federal Drug Administration's approval.

agreed with the Advocated General's reasoning that the practice interfered with the patentee's essential rights.

The two Court of Justice cases mentioned above appear to be the only ones regarding Member State restrictions on the free flow of goods in which American cases were cited. It is somewhat surprising that, contrary to expectations, American cases dealing directly with state restraints on the movement of goods do not seem to be cited more frequently in litigation before the Court of Justice. The use of U.S. case law has, on the other hand, been more frequent in the antitrust (or, in Community parlance, competition) area. Here, the relevant rules, in particular articles 85 and 86 of the Treaty, are quite similar to U.S. law.[22] At times, American cases seem to be quoted because the American experience provided a helpful clue as to the solution for a very similar problem arising in the Community context. Thus, *Musique Diffusion Française v. Commission*[23] involved allegations concerning a conspiracy by distributors of Pioneer audio products to partition the Community market, which they denied. The Advocate General cited *Eastern States Lumber Dealers Association v. United States*[24] for the statement that "conspiracies are seldom capable of proof by direct testimony" to support taking action nevertheless.

A result also consistent with the views of the U.S. Supreme Court is *Ministère Public v. Tournier*.[25] In that case, the French music copyright society SACEM had reciprocal arrangements with the corresponding societies in other countries, by which it obtained the exclusive right to grant performance licenses for works represented by

22. Thus, article 85 of the Treaty (article 81 after ratification of the Amsterdam Treaty) prohibits "agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States...." Article 86, on the other hand, prohibits the abuse of a dominant position, by way of excessive prices or other unfair trading conditions, limiting production or technical developments to the detriment of consumers, discriminatory pricing, tie-in sales, etc. These provisions may be compared with section 1 of the Sherman Act, 15 U.S.C. section 1, which prohibits contracts, combinations or conspiracies in restraint of trade and sections 2 and 3 of the Clayton Act, 15 U.S.C sections 13 and 14, which prohibit certain forms of price discrimination, tying arrangements and so forth.

23. Joined Cases 100 to 103/80, Musique Diffusion Française v. Commission, 1983 E.C.R. 1825.

24. Eastern States Retail Lumber Dealers Ass'n v. McBride, 234 U.S. 600, 612 (1914).

25. Case 359/87, Ministère Public v. Tournier, 1989 E.C.R. 2521, Common Mkt. Rep. (CCH) ¶ 815 (1990).

the foreign societies. It did, of course, have the right to grant such licenses for the works of French composers, musicians performers and so forth. It required discothèques and similar establishments that wanted to play copyrighted music to enter into a blanket agreement with it under which the licensee obtained permission to play any and all works in SACEM's repertory, foreign or domestic, in return for a license fee based on the discothèque's gross revenues. As many discothèque owners played only a small portion of the total works so licensed to them, mainly dance music of American or British origin, they objected to that practice as excessively expensive and some refused to pay the royalties demanded.

When they were prosecuted for copyright violation, they argued that the blanket licenses violated the Community rules on competition. The matter eventually wound up in the Court of Justice. On the issue stated,[26] Advocate General Jacobs referred extensively to the U.S. Supreme Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[27] which also involved blanket licenses. The Advocate General noted that in the U.S. Supreme Court's view, blanket licenses did not involve a *per se* violation of the antitrust laws, but had to be evaluated under a "rule of reason" approach," which balances anti-competitive features of the blanket licenses against their procompetitive advantages. The Advocate General also noted several lower federal court cases[28] which had weighed the anti-competitive effects of blanket licenses against their practical advantages, in particular the easy and inexpensive manner in which blanket licenses could be administered, compared with a license based on the actual titles played in each establishment. The Advocate General therefore recommended that a similar approach should prevail under Community law, but he felt that this weighing was a matter for the national courts, not for the Court of Justice because the national courts were more familiar with the factual problems in the concerned Member States. The Court of Justice agreed with the Advocate General, holding that the practice mentioned did not violate Community competition rules unless it could be shown that granting discothèques access only to a part of a copyright management soci-

26. The case involved a number of other issues, but no American cases were cited and are not being discussed here.

27. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

28. The Advocate General mentioned *Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors and Publishers*, 744 F.2d 917 (2d Cir. 1984) and *Broad. Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del. 1981).

ety's repertory would provide adequate protection to the authors and composers' rights involved without causing undue practical complications.

American case law also seems to have made a certain impact on the question to what extent local (in this case, Community) antitrust law may be applied to non-local activities which have a local impact. In the so-called "Wood Pulp" case, *A. Åhlström Oy. v. Commission*,[29] a number of producers of wood pulp from non-Community countries, including the United States, Canada, Austria and Finland were accused of concerted practices intended to lead to unduly high prices in the Community. The parties objected that this amounted to the extraterritorial application of Community competition rules. The American parties also claimed that whatever common arrangements they might have amongst themselves amounted to a lawful export cartel under the American Webb-Pomerene Act and international comity prevented the Community from subjecting them to conflicting Community rules.

On the question whether Community law could be applied to agreements or concerted practices concluded or entered into outside the Community, Advocate General Darmon extensively discussed American law, in fact entitling part of his submission, "The Principles of United States Law."[30] The Advocate General referred to the old *American Banana*[31] case and especially to the leading case *United States v. Aluminum Co. of America*,[32] in which Judge Learned Hand formulated the so-called "effects doctrine." Under the effects doctrine, any state may impose liabilities for conduct outside its borders that has consequences within its borders. The Advocate General then surveyed a number of subsequent federal court of appeals cases. He concluded from his extensive survey that the American case law was ample and enlightening, but that no sufficiently clear approach emerged from it so that one could directly apply the American rule in the Community context. He nevertheless urged an approach that could be viewed as consistent with the American approach as of the time of Mr. Darmon's writing, namely that foreign activities can be subjected to local competition rules if they have a sufficiently sub-

29. Joined Cases C-89, C-104, C-114, C-116, C-117 & C-125 to C-129/85, Åhlström Osakeyhtio v. Comm'n, 1988 E.C.R. 5194.

30. *See id.* at 5220 n.28. In the original French text of the submissions, the heading reads, "*Les enseignements du droit américain.*"

31. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

32. United States v. Aluminum Co. of Am., 148 F.2d 416 (1945).

stantial local impact.

This approach was followed in the Court of Justice's decision. In essence, it held that though the various parties' agreements or concerted practices may have occurred abroad they effectuated them in the Community through the prices charged there. The Court of Justice also dealt with the issue, raised by the American parties, that because their conduct was lawful under American law, comity prohibited the application of contrary Community rules to their agreements. The Court stated that even assuming there was such a principle, it was inapplicable since American law may have authorized the parties' conduct, but in no way commanded it so that they were not subject to any contradictory obligations.[33] Interestingly, the U.S. Supreme Court made a quite similar statement shortly thereafter when it held that a group of British reinsurance companies who carried on an extensive reinsurance business in the United States were not exempt from American antitrust law on the ground, raised by the reinsurance companies, that their reinsurance business was subject to detailed regulation in the United Kingdom and they were in compliance with those rules.[34]

Occasionally cases show, however, that the American approach to antitrust may, at times, be different from that in the Community, in spite of similar language in applicable provisions. Thus, in *Tetra Pak International SA v. Commission*,[35] Tetra Pak, a manufacturer of

33. The Wood Pulp case was an instance in which the Commission lost a battle but won the war. After the Court of Justice decided that Community law could be applied to the parties, the case was remanded to the Commission. When the case came back before the Court of Justice on the merits, a number of the Commission's findings were not upheld. Joined Cases C-89, C-104, C-114, C-116, C-117 & C-125 to C-129/85, Åhlström Osakeyhtio v. Comm'n, 1993 E.C.R. I-1307. However, the Court of Justice's ruling on the extraterritorial application of the Community's antitrust provisions is still the law.

34. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). There is no mention of the Wood Pulp case in this opinion. It may be worth while to note that the Court of First Instance of the European Communities, which now has particular jurisdiction to hear cases seeking a review of Commission decisions, occasionally refers to U.S. Supreme Court decisions as well. *See, e.g.*, Joined Cases T-24, 25, 26 & 28/93, Compagnie Maritime Belge Transports v. Comm'n, 1996 E.C.R. II-1201, 1207, Common Mkt. Rep. ¶ 74 (1997) (mentioning the "Noerr-Pennington" doctrine developed in *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), which held that an attempt to influence governmental action, such as the adoption of legislation, is not a violation of the antitrust laws). This brief article is generally limited to cases from the Court of Justice since cases from the Court of First Instance are highly fact specific and, therefore, do not permit any broader conclusions.

35. Case C-333/94 P, Tetra Pak Int'l v. Comm'n, 1996 E.C.R. I-5951, Common

cartons for regular and UHT milk and similar products and of the equipment necessary to fill these, was accused by the Commission of the European Communities[36] of various abuses, including predatory pricing and was fined. The Court of First Instance of the European Communities[37] affirmed the Commission's action, holding, *inter alia*, that it was not necessary to show Tetra Pak had a reasonable likelihood of ultimately recovering the money lost by its pricing strategy.

Tetra Pak appealed to the Court of Justice. The Advocate General dealt with Tetra Pak's contention that the Court of First Instance erred on this point, for which proposition the U.S. Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[38] was invoked. In that case, the U.S. Supreme Court conceded that a predatory intent was hard to prove, but felt that abnormally low pricing by itself should not be deemed predatory, in the absence of proof of a reasonably good chance of recovery, following the elimination of the competitor targeted, of the amounts initially lost. The very purpose of antitrust law was the achievement of low prices through competition, and this would be discouraged by undue accusations of predatory pricing.

The Advocate General agreed with the U.S. Supreme Court that predatory pricing was hard to prove, but for that very reason felt that proof of a reasonable likelihood of recovery of money lost should not be required. In instances where a firm in a dominant position priced goods below marginal cost, it could have no intent but predation, though a wrongful intent would have to be shown if such a company priced its products simply below average costs. The Court of Justice confirmed the decision of the Court of First Instance and thus agreed with the Advocate General.

The matter seems to show that in antitrust law, in spite of many basic similarities, there are differences in approach. In the United States, low prices for the consumer are viewed as a basic purpose of

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Mkt. Rep. ¶ 186 (1997).

36. The Commission is a body composed of independent personalities, a kind of universal administrative agency which implements, *inter alia*, the EC's competition rules. In addition, the Commission has the right to propose EC legislation and sue Member States for Treaty violations.

37. Antitrust decisions by the Commission are reviewable by the Court of First Instance on the law and the facts, with further review on questions of law to the Court of Justice. *See* EC TREATY art. 168a (article 225 after the Amsterdam Treaty is ratified).

38. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

antitrust policy; in the Community, the emphasis seems rather to be on the protection of competition *per se*, and thus also of competitors.[39]

Patent cases sometimes involve concerns somewhat related to antitrust cases because they must balance the patent holder's rights against the impact of those rights on competition. Here too, the Advocates General sometimes seek guidance from the U.S. Supreme Court. In *Bayer A.G. v. Sullhofer*,[40] the question was whether a "no challenge" clause included in an agreement settling a patent claim violated Treaty rules on the free movement of goods (in particular article 30) and competition. The Advocate General mentioned, in this context, *Lear v. Adkins*,[41] which held that such clauses were against public policy. The Court of Justice agreed in part. It recognized that such clauses might unduly restrict competition, but only if the license involved was not free or the patented technology was not outdated.

U.S. Supreme Court cases are present also in Community law that is less "economic" in nature, in particular the field of equal rights for men and women.[42] Article 119 of the Treaty provides for the elimination of discrimination in pay between men and women. In spite of the somewhat vague wording of the provision, the Court of Justice ruled in the second *Defrenne* case[43] that the provision was directly applicable ("self-executing") and bound employers and employees in the Community. The principle was further implemented by a Directive of the Council[44] of the European Communities.[45]

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39. *Cf.* A. Frederickson and J. Carr, *Inside DGIV*, EURO. COUNS., at 13, 19-20 (Nov. 8, 1997) (interviewing the head of the Commission's Directorate General IV (DGIV), which deals with competition matters).

40. Case 65/86, Bayer v. Sullhofer, 1988 E.C.R. 5249, Common Mkt. Rep. (CCH) ¶ 220 (1990).

41. Lear, Inc. v. Adkins, 395 U.S. 653 (1969).

42. Article 6 of the Treaty (article 12 after ratification of the Amsterdam Treaty) prohibits discrimination on account of nationality within the scope of application of the Treaty, but apart from the prohibition of discrimination between men and women in pay, article 119 contains no additional rules against discrimination, based, for example, on religion, age, etc. Article 13 of the Amsterdam Treaty, however, would authorize the Council of Ministers (see *infra* note 44) to adopt provisions prohibiting discrimination based on ethnic origin, sex, religion, ideology, handicap, age or sexual orientation.

43. Case 43/75, Defrenne v. SABENA, 1976 E.C.R. 455.

44. The Council of Ministers is composed of one cabinet Minister from each Member State. It is the chief law-making body in the EC, though it normally acts on a proposal from the Commission. To some extent, it must cooperate with the European Parliament, which is composed of directly elected members. The main forms

In 1990, the Court of Justice faced the question of the principle of non-discrimination in pay in a rather special context in *Barber v. Guardian Royal Exchange Assurance Group.*[46] In that case, the employer had a rule according to which women who were dismissed as a result of reductions in staff could obtain, in some instances, a retirement pension immediately while men in such a situation could obtain a pension only upon reaching normal retirement age. The Court of Justice ruled that this violated the equal pay principle but decided that the decision should not be retroactive; for good measure, the Member States added a further non-retroactivity provision to the 1992 Maastricht Treaty on European Union in Protocol Number 2.

The *Barber* decision raised two issues: (1) to what extent other forms of inequality in employment based pensions were rendered unlawful by the Court of Justice; and (2) precisely what the principle of non-retroactivity meant in such contexts. These issues were raised in a number of cases, in particular *Ten Oever v. Stichting Bedrijfspensioensfonds*[47] and *Coloroll Pension Trustees, Ltd. v. Russel*,[48] for which Advocate General Van Gerven provided a single, comprehensive set of submissions, though the cases involved somewhat different, but globally similar, problems.

The pension schemes in all of the cases were provided by employers (with employee contributions) as a supplement to (and in some instances as a partial replacement for) the standard governmental (social security) retirement benefits. The retirement schemes were essentially of the "defined benefit" type, that is employees were promised a retirement pension calculated generally on the basis of last or average salary and length of service, and these benefits were funded by contributions from employees and employers. Some of the plans offered, as an option, the replacement of the pension by a lump

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of Community legislation are: "regulations," which are immediately and directly applicable in all Member States (somewhat like federal statutes in the United States) and "directives," which generally must be transposed into national law by the Member States. *See* EC TREATY art. 189 (249 after ratification of the Amsterdam Treaty). Since 1993, the official name of the Council of Ministers is "Council of the European Union"; it is often referred to simply as the "Council."

45. Council Directive 75/117, 1975 O.J. (L 45) 19.

46. Case C-262/88, Barber v. Guardian Royal Exch. Assurance Group, 1990 E.C.R. I-1889, Common Mkt. Rep. (CCH) ¶ 653 (1990).

47. Case C-109/91, Ten Oever v. Stichting Bedrijfspensioensfonds, 1993 E.C.R. I-4879.

48. Case C-200/91, Coloroll Pension Trustees Ltd. v. Russell, 1994 E.C.R. I-4389, Common Mkt. Rep. (CCH) ¶ 489 (1994).

sum benefit or continuation of the pension to a surviving spouse in return for a reduction in the benefit. In connection with the application of the equal pay principle to certain aspects of these plans, some of the parties argued that taking account of the longer average life span of women, compared with that of men, was not discrimination since it related to an objective difference between men and women.

The Advocate General, however, insisted that this was not a legitimate distinction. He relied heavily on *City of Los Angeles Department of Water and Power v. Manhart*[49] and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris.*[50] In particular, he quoted the statement in *Manhart* that statistical differences in longevity were not material in group insurance plans since the grouping of insurance risks always results in the better risks subsidizing the poorer ones. To defeat the argument that disregarding sex-based differences in longevity would impair the financial soundness of retirement plans, he referred to the experience in the United States where that was not permissible, specifically by citing *Norris.* Actuarial factors could, of course, be used in setting up a pension plan, but the benefits paid to employees, and the plan contributions to be made by them had to be identical.

The Court of Justice largely agreed with the position of the Advocate General. It stated that in "defined benefit" pension schemes, the benefits paid to male and to female employees had to be identical. Furthermore, the contributions required of employees, which were deductions from salary, had to be identical as well. It was not, however, a violation of the equal pay principle for the employer to make a proportionately greater contribution for the female members of the plan than for male members in order to preserve the plan's actuarial soundness and thus to take the greater longevity of women into account. Somewhat more surprisingly, the Court of Justice also indicated that in instances in which an employee could, under the plan, take the actuarial value of future benefits in cash in lieu of the future benefits or convert part of the actuarial value into survivor benefits (thus reducing the immediate pension), the use of sex-based actuarial tables was not unlawful to calculate that actuarial value.[51]

49. City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978).

50. Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Compensation v. Norris, 463 U.S. 1073 (1983). The Advocate General also mentioned *Florida v. Long*, 487 U.S. 223 (1988).

51. Some of the litigation mentioned in the text started in the Court of Justice

The Court of Justice thus agreed with the U.S. Supreme Court to the extent that there were U.S. Supreme Court cases on point, but it did not extend the reasoning into areas not covered by U.S. case law.

Not surprisingly, American law, in particular the case law of the U.S. Supreme Court, has impacted the area of affirmative action, usually referred to as "positive action" in the Community. In areas other than pay (including, as noted above, pay related benefits), equal treatment of men and women in the Community is governed by Directive 76/207/EEC.[52] Article 1 of the Directive requires Member States to put the principle of equal treatment of men and women at the work place into effect in all employment-related areas. Article 2(4) authorizes measures to promote equal opportunity for men and women, in particular, by removing existing inequalities which affect women's opportunities in employment.

The German city-state of Bremen adopted legislation, according to which if in a particular department women were underrepresented, an automatic preference had to be given to women candidates for a job in that department if her qualifications were equal to that of the male candidate(s). A male candidate who was denied employment under this rule brought suit against the city government, and the issue of whether the German local law was compatible with the directive came before the Court of Justice in *Kalanke v. Freie Hansestadt Bremen.*[53] In long submissions, Advocate General Tesauro noted that "affirmative action" had, in a sense, been born in the United States and amounted to a turning from an individual to a group definition of equality. He discussed in some detail the rejection of strict quotas in *Regents of the University of California v. Bakke*[54] as well as the U.S. Supreme Court's greater tolerance for goals of limited duration in the case of clear evidence of past discrimination.[55] Mr. Tesauro clearly

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before the Council of the European Communities attempted to clarify the rules on non-governmental pension schemes by Council Directive 86/378, 1986 O.J. (L 225) 40. As a result of the decisions in the cases mentioned, the directive was amended by Council Directive 96/297, 1997 O.J. (L 46) 20, which in essence repeats the Court of Justice holdings. The amended directive prohibits discrimination between men and women in access or size of benefits and in contributions, but permits for "defined benefit" schemes, unequal payments for the conversion of future benefits into a capital sum, or in the case of the surrender of part of a pension, in return for survivor benefits.

52. Council Directive 76/207, 1976 O.J. (L 39) 40.

53. Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. 1995, Common Mkt. Rep. (CCH) ¶ 208 (1996).

54. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

55. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979). The Advocate

shared the dislike for strict quotas expressed by the U.S. Supreme Court in *Bakke*, noting that the aim should be equality at the starting gate, not necessarily at the finish line. However, this would require real social change in order to give women the same chances in employment as men.

The Court of Justice obviously shared the misgivings of its Advocate General about numerical goals in affirmative action. It ruled that where such goals gave an absolute preference to women, without any regard for personal, individualized factors, there was a violation of the principle of equal treatment. Interestingly, the Commission subsequently prepared a document on its interpretation of the ruling in *Kalanke*.[56] This document had a separate section (part 5A) on the approach of the U.S. Supreme Court concerning affirmative action, in which it reviewed many of the same cases the Advocate General examined. Its conclusion was that the ruling in *Kalanke* did not prevent a preference for women based on numerical goals, as long as that preference did not prevent taking individual characteristics and features of specific candidates into consideration. The Court of Justice subsequently confirmed that interpretation.[57]

III. Conclusion

On the basis of the limited survey above, it would seem that the impact of U.S. Supreme Court (and lower federal court) cases on European Community law varies. The impact appears to have been most pronounced in the area of competition law. Probably, however, this is not due to any unreasonable fascination with the United States but rather to the fact that American antitrust law preceded Community competition law by many generations. Thus, it was natural to look for guidance in the interpretation of Community competition rules to a body that had a much longer experience with such rules. But this deference to American examples has certainly not been blind; as the *Tetra Pak* case[58] shows, Community and American antitrust rules pursue, to some extent, different objectives, which may be due to different ways of looking at the economy and, beyond, at society.

General also explained the strict scrutiny (as opposed to the rational basis) test mentioned in *City of Richmond v. Crow*, 488 U.S. 469 (1989).

56. COM(96) 88 final.

57. Case C-409/95, Marschall v. Land Nordrhein-Westfalen, 1997 E.C.R. I-81.

58. Case C-333/94 P, Tetra Pak Int'l v. Comm'n, 1996 E.C.R. I-5951.

The impact of American cases in the sex discrimination field may involve reasons somewhat similar to those mentioned in connection with antitrust. Though this field is not as old as antitrust, the American experience is, nevertheless, much longer than that of the Community. While the detailed rules are not as similar as in the antitrust field, their general purpose obviously is. Again, it was reasonable to profit from the American experience.

It is more puzzling why the American experience in the field of federal-state relations in connection with the "commerce clause" had little or no impact on Community interpretation of similar issues. The reason is perhaps that, while there is a fundamental similarity between the purposes of a "common market" as mentioned in article 2 of the Treaty and the purposes of the commerce clause, the principle of a "common market" in article 2 is elaborated on in a whole series of Treaty provisions in further detail which would have been too space consuming to completely mention here. The Court of Justice thus often concentrated on quite narrow and precise issues, rather than on broad problems of Member State-Community relations for which American precedents might have been useful.